IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14780 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SANJAY NATUBHAI HARIYANI

Versus

THE COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 14780 of 2004

MS BANNA S DUTTA for Petitioner No. 1

MS HB PUNANI, LD. AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 27/12/2004

ORAL JUDGEMENT

Heard Ms.Banna Dutta, learned counsel appearing for the petitioner and Ms.H.B. Punani, ld.AGP, appearing on behalf of the respondents.

2. The present petition is filed under Article 226 r/w. Articles 21 and 22(5) of the Constitution of India. The petitioner has challenged legality and validity of the order of detention dated 17th June, 2004, passed by the Commissioner of Police, Rajkot City, under the purported exercise of powers vested with the Detaining Authority under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short 'the Act').

3. The petitioner is branded as a "bootlegger" within the meaning of Section 2(b) of the Act, as he was found involved in an offence registered under the Bombay Prohibition Act. The grounds for detention supplied to the petitioner-detenu indicate for recording subjective satisfaction and passing the order of preventive detention, in reference to the Scheme of Sec.3 r/w. 9(1) of the Act, the detaining authority-Police Commissioner, Rajkot City, has taken into account the fact of registration of solitary criminal offence being C.R. No.323/2004 registered with Rajkot (Rural) Prohibition Police Station for the offences punishable under Sections 66-B, 65AE, 116B, 81, 98 and 99 of the Bombay Prohibition Act registered on 28th May, 2004. The sponsoring authority has also placed statements of two witnesses before the detaining authority claiming privilege under Sec.9(2) of the Act recorded on 14th June, 2004 i.e. approximately after 17 days from the date of registration of the offence. Having considered the totality emerging from the record, statements of the witnesses, according to ld.counsel Ms.Dutta, do not inspire confidence because they are vague in nature. According to ld.counsel, order under challenge is illegal, arbitrary and violative of constitutional guarantee flowing from Articles 21 and 22 of the Constitution of India.

4. The order of detention is challenged on various grounds mentioned in the petition. However, ld.counsel Ms.Dutta appearing for the petitioner-detenu has challenged the legality and validity of the order mainly on two grounds. The first ground pressed into service by ld. counsel Ms.Dutta is that the petitioner has been wrongly branded as a "bootlegger" and his activities are dangerous to the maintenance of public order, as he was involved in solitary offence under the Bombay Prohibition Act. The second ground pressed into service by Ms.Dutta is that as per the settled legal position of the decision of this Court in the case of Sohanlal Surjaram Visnoi v. State of Gujarat and ors., reported in 2004(2) GLR 1051, the impugned order of detention requires to be quashed as the present case is squarely covered by the ratio of the

cited decision.

5. I have gone through the above cited decision. For the sake of convenience, I would like to quote relevant paras: 4 and 5 of the said decision, which are as under :

"4. Article 22(3) of the Constitution of India expressly provides that the safeguards contained in Art.22(1) and 22(2) of the Constitution are not to apply to preventive detention. Article 22(4) of the Constitution provides and opens with double negative, put in positive form, and in its real substance, means that a law which provides for preventive detention for a period longer than three months, shall contain all the provisions prescribed in clause (4) and (5) of Article 22 of the Constitution. Article 22(5) of the Constitution prescribes that when any person under a preventive detention law is detained, the authority making the order, shall as soon as may be, communicate to such person, the grounds on which the order has been made, and shall forward him with the earliest opportunity of making a representation against the order. Article 22(5) of the Constitution is of general importance and operation in respect of every detention order made under any preventive detention law.

5. In this group of petitions, all the detenus, except the one in Special Civil Application No.825 of 2003, are treated and described as "bootleggers" as defined under Sec.2(b) of the P.A.S.A. Act, and in this case also, a solitary incident is made basis for passing the detention order against him."

So on this sole ground, without entering into merits of the other grounds raised in this petition, the petition requires to be allowed.

6. It is relevant to note that two co-detenus namely Vinod Becharbhai Nasit and Narendra Nathubhai Jethva have been set at liberty by this Court vide order dated 21st December, 2004, while dealing with Special Civil Application Nos.8678 of 2004 and 11687 of 2004, respectively.

7. Ms.H.B.Punani, ld.AGP, has argued that the

present petitioner cannot claim parity because it is specifically mentioned in the grounds for detention recorded by the Detaining Authority and conveyed to the petitioner that the petitioner, on account of registration of six offences punishable under the Bombay Prohibition Act, was ordered to be externed from the areas mentioned in the order of externment dated 26th June, 2003 by the Dy.Police Commissioner, Rajkot City. The petitioner was externed for a period of two years and the fact of registration of offence within a period of two years of externment i.e. on 28th May, 2004, indicates the gravity of the offence and the threat created by the petitioner against the maintenance of public order. In that background, the statements of two witnesses who have claimed privilege should be read and the same have been considered by the Detaining Authority. So the order of preventive detention should be held to be reasonable and genuine one.

8. In response to the above resistance from the ld.AGP, ld.counsel appearing for the petitioner has pointed out that the petitioner was not able to put up his case and carve out effective representation against the preventive order of detention under challenge because he was not supplied with all the relevant documents concerning the externment proceedings initiated under Section 51 r/w. Section 59 of the Bombay Police Act. It is argued that in the written representation made by the petitioner-detenu, he has demanded two vital documents from the Detaining Authority along with certain documents referred to in sub-paras :4 to 10 of the representation dated 11th October, 2004. It was specifically requested by the petitioner-detenu that he may kindly be supplied with a copy of the notice to show cause issued under Section 59 of the Bombay Police Act and in the same way, he should also be supplied with a copy of the complaint/ proceedings initiated, if any, for breach of externment order. This demand is made in sub-paras: 11 and 12 of the representation. There is nothing on record to show that these two documents were supplied to the petitioner-detenu at the earliest. It is not even the say of the respondent-authority that these documents either were not relevant or they were supplied promptly. With this set of facts, it should be held that at least the continued detention of the petitioner becomes bad and should not be permitted to be continued.

9. Having considered the facts emerging from the order of externment, it appears that the fact of registration of six different offences was considered by the externing authority; out of which in four cases, the

petitioner has been prosecuted having been found in a drunken condition; and three of the six offences are of the years 1998 and 1999. The offence at Sr.No.5 in the order of externment is of 14th May, 2000 and the last offence referred to by the externing authority is of 26th August, 2002. So it can be said that for continuous two years, no prosecution was instituted against the present petitioner. With this fact situation, it would be appropriate for the Court to hold that the involvement of the petitioner in an offence punishable under the Bombay Prohibition Act in the month of May, 2004, cannot be said to be the conduct prejudicial to the maintenance of public order. It is an independent wrong concerning maintenance of law and order. There is some force also in the arguments of Ms.Dutta that non-supply of vital documents though demanded, would go to the root of the validity of the order of detention.

10. So on the above grounds, the Court is accepting the say of the petitioner that the authority has committed grave error in recording subjective satisfaction that the activities of the petitioner are prejudicial to the maintenance of public order. Obviously, therefore, it was erroneous to exercise privilege vested with the authority under the Act. So without entering into the merits of other grounds, the order of detention is required to be quashed and set aside.

11. In view of the above, the present petition is hereby allowed. The order of detention dated 17th June, 2004, passed by the respondent no.1 herein is hereby quashed and set aside and the petitioner-detenu is hereby ordered to be set at liberty forthwith, if no longer required for any other case. Rule is made absolute with no order as to costs. Direct Service is permitted.

(C.K. Buch, J)

Aakar